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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOVANNY JOSUE MENDEZ, Defendant and Appellant.	G057464 (Super. Ct. No. 09CF1034) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed as modified and remanded with directions.

Law Offices of Allen G. Weinberg and Allen G. Weinberg for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew S. Westman and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

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Joveny J. Mendez appeals from the trial court's sentencing order declining to strike a formerly mandatory 20-year firearm enhancement. In *People v. Mendez* (Nov. 27, 2018, G054985) [nonpub. opn.] (*Mendez I*), this court upheld Mendez's conviction for felony offenses including attempted murder for firing multiple shots into an occupied barber shop, but we remanded the case for resentencing under then-new retroactive firearm enhancement legislation. (*Ibid.*, citing Sen. Bill No. 620 (2017-2018 Reg. Sess.).) Mendez again seeks remand under case authority holding the trial court not only has discretion to impose or strike the 20-year enhancement, but alternatively may select a lesser term than 20 years for the enhancement. (*People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*).) In supplemental briefing, Mendez also suggests remand is appropriate under new legislation providing that a prior prison term does not apply at all, rather than just—as the court did in its discretion here—striking the prior for purposes of sentencing. Mendez suggests this change regarding prison priors could have affected the trial court's sentencing calculus.

As we explain, we disagree that resentencing is necessary here. We direct the trial court to make one change: to correct its minutes by dismissing a prison prior allegation that it does not appear the court addressed at sentencing, but which lacks any applicability under new legislation. Apart from that correction, we affirm the trial court's sentencing decisions in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2009, Mendez and three other men accosted Brian S. in an alley near a beauty salon and stole his cell phone, music player, and headphones. When Brian returned home and told his father and a family friend, Michael Garcia, about the incident, Garcia went back to the alley with Brian to retrieve the phone. Brian and Garcia found Mendez and one of the other men still in the alley. Refusing to return the phone, Mendez instead took a fighting stance, but Garcia knocked him out with a single punch. Mendez's accomplice attempted to attack Garcia from behind when Garcia grabbed the phone, but Brian blocked him, and the man fled.

Later that month, Garcia was waiting for a haircut around the corner from the alley where the altercation took place when he saw through the salon window that Mendez was approaching. Garcia exited the salon to avoid a confrontation, but when he saw Mendez had a gun, Garcia retreated back inside. Mendez fired at least four shots at the salon, which was occupied by about a dozen people including three or four children. The shots shattered the glass window in the front door, and investigators later recovered five bullet fragments from inside and outside the salon.

A jury convicted Mendez of attempted premeditated murder (count 1, Pen. Code, §§ 187, subd. (a), 664, subd. (a)),[1] assault with a firearm (count 2, § 245, subd. (a)(2)), shooting at an occupied building (count 3, § 246), and possession of a firearm by a felon (count 4, § 12021, subd. (a)(1)). The jury also found true, as to count 1, a penalty enhancement allegation that Mendez personally discharged a firearm in committing the offense (§ 12022.53, subd. (c)) and, as to count 2, an enhancement for personal use of a firearm (§ 12022.5, subds. (a), (d)). Before trial, the court dismissed all gang-related enhancement allegations pursuant to section 995.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

At sentencing, after the court struck Mendez's admitted prior strike conviction and apparently disregarded the prior prison term allegation that Mendez also admitted in bifurcated proceedings, the court imposed a life sentence with the possibility of parole, plus a consecutive 20-year determinate term.[2] The sentence consisted of a life term on count 1, with a then-mandatory 20-year consecutive term for the firearm enhancement, and concurrent middle terms of five years and two years, respectively, on counts 3 and 4. The court stayed sentence on count 2 and its associated firearm enhancement pursuant to section 654.

On appeal in *Mendez I*, we rejected Mendez's claims of prosecutorial misconduct and sentencing error under section 654, but remanded the case for resentencing. As the Attorney General conceded, remand was necessary because then-recently adopted Senate Bill No. 620 operated retroactively to give the trial court discretion to strike the 20-year enhancement for personal discharge of a firearm (§ 12022.53, subd. (c)), which previously had been mandatory. (*Mendez I, supra*, G054985; see former § 12022.53, subd. (h).)

On remand, the trial court heard argument regarding resentencing. Defense counsel emphasized the fact that "no one was injured" as a "significant detail to . . . strike the 20-year enhancement," suggesting that "what he did was dangerous, but he is serving time on that crime . . . ." The prosecutor countered that the enhancement was for discharging a firearm, not for attempted murder. In other words, it was an enhanced penalty for the manner in which Mendez committed the underlying offense, consistent with the Legislature's purpose in enacting the enhancement to "send a message that if

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[2] In our prior opinion in *Mendez I, supra*, G054985, we accepted the parties' representations that the trial court struck Mendez's admitted prison prior (§ 667.5, subd. (b)) for purposes of sentencing, but on re-examination it appears the court simply disregarded the allegation despite Mendez's admission. Nothing suggests the admission factored into the court's sentencing determination.

you fire a gun," while committing a crime, "that is behavior that we want to strongly condemn and punish."

The prosecutor also observed that "[i]f he had injured somebody, there would have been an additional penalty for that, . . . an additional life count." (See § 12022.53, subd. (d) [consecutive term of 25 years to life for personal discharge of a firearm causing great bodily injury].) The prosecutor continued, "So, I think the [L]egislature has taken a reasonable approach here and said, 'Look, not all gun uses are the same.' [¶] When someone just uses a gun or displays a gun, that's ten. When you discharge it, but don't hurt anybody, that's 20. If you discharge it and there's injury, you hurt somebody, then the punishment goes up. . . . [¶] So I think the [L]egislature has taken into account [d]efense counsel's concern of no injury and that's why the punishment is 20 [years] on this." The prosecutor also emphasized "this was a case in which the defendant, in broad daylight, in a public area of a shopping center, targeted his victim for retaliation. He fired numerous shots," including some "striking a glass window that led to a crowded barber shop that had children inside," and then Mendez fled from California that evening, escaping accountability for eight years.

Defense counsel observed that Mendez was around 30 years old at the time of resentencing and that the underlying sentence alone was "a significant amount of time" as a life sentence. The trial court noted that Mendez's sentence for attempted murder was "not 25 to life," contrary to counsel's suggestion, but instead a life sentence that carried a parole eligibility date "in 14 years."

In declining to strike the firearm enhancement, the court concluded, "[T]his is a case where the firearm was used in a premeditated attempt[ed] murder, numerous shots were fired, not only at the victim, but towards others that were in the occupied building, so it's not the type of case where the interests of justice would be served by striking that provision." The court reinstated Mendez's original sentence under all prior terms, except for a minor clerical modification. Mendez now appeals.

DISCUSSION

Relying on *Morrison*, which was decided a month after his resentencing hearing, Mendez contends remand is appropriate to allow the trial court to consider whether to modify the 20-year firearm enhancement it imposed under section 12022.53, subdivision (c), to the 10-year enhancement in subdivision (b) of that section. The Supreme Court has granted review to consider whether a trial court has discretion to substitute a lesser firearm enhancement for one that a jury found to be true beyond a reasonable doubt. (See *People v. Tirado* (2019) 38 Cal.App.5th 637, review granted Nov. 13, 2019, S257658 (*Tirado*).) Pending the high court's determination, we join the courts that disagree with *Morrison*. (*Tirado*, *supra*; *People v. Garcia* (March 18, 2020, B293491) __ Cal.App.5th __; *People v. Yanez* (2020) 44 Cal.App.5th 452.) In any event, even if *Morrison* applied, remand is not warranted because the trial court's comments and the lack of any mitigating circumstances indicate it would be a futile gesture.

We first address our disagreement with *Morrison*. There, the court recognized that, in addition to the 25-year-to-life enhancement set forth in section 12022.53, subdivision (d), for causing death or great bodily injury with a firearm, section 12022.53 also contains lesser included enhancements of 20 years for discharging a firearm and 10 years for using a firearm, under subdivisions (c) and (b), respectively. (*Morrison*, *supra*, 34 Cal.App.5th at p. 221.) The court found it significant that in cases where the subdivision (d) enhancement is unsupported by substantial evidence, or is otherwise legally defective, the trial court could impose an uncharged enhancement under subdivision (b) or (c). (*Morrison*, at p. 222.) Given the trial court's authority in those situations, *Morrison* concluded there was "no reason a court could not also impose one of these [lesser] enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385." (*Id.* at pp. 222-223.) Thus, even though the subdivision (d) enhancement was supported by substantial evidence and legally applicable in *Morrison*, the court held the trial court "had the discretion to impose [a 10-

or 20-year] enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385." (*Id.* at p. 223.)

We respectfully disagree with this holding. As the *Tirado* court pointed out, section 12022.53, subdivision (h), gives the trial court the discretion to "strike" or "dismiss" a firearm enhancement in the interest of justice under section 1385. (*Tirado, supra,* 38 Cal.App.5th at p. 643.) "This language indicates the court's power pursuant to these sections is binary: The court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement." (*Ibid*.) *Tirado* was also concerned that implying such power would undermine the separation of powers doctrine by encroaching on the prosecution's authority to determine what charges to file. (*Id.* at p. 644.) Therefore, *Tirado* held that under section 12022.53, subdivision (h), the trial court's authority is "limited to either imposing or striking" a firearm enhancement; the court does not have the power to impose punishment for a lesser included enhancement. (*Ibid*.)

We agree with *Tirado*. Outside the context of cruel and/or unusual punishment rising to the level of a constitutional violation (see e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 478), courts generally do not have authority to adjust legislatively directed sentences. Instead, "in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments." (*In re Lynch* (1972) 8 Cal.3d 410, 414.) Thus, findings supporting judicial override of mandated sentences "have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) In *Dillon,* for example, mandatory imposition of a first degree murder sentence under the felony-murder rule—and against the trial court's and the jury's express recommendations—violated constitutional norms where the defendant was "an unusually immature youth." (*Dillon,* at pp. 484-485, 488.) Therefore, the high

court in *Dillon* reduced the applicable offense and punishment to a second degree term. (*Id.* at p. 489.)

Here, Mendez does not argue imposition of the 20-year firearm enhancement amounts to cruel or unusual punishment, and the record would not support such a contention. In these circumstances, we disagree with *Morrison* that a trial court in its discretion may depart from legislatively prescribed sentencing options to impose an enhancement penalty of its own choosing. We agree with *Tirado* and the emerging consensus rejecting *Morrison*.

Even if we agreed with *Morrison*, however, we conclude it would not here require remand. Mendez seeks remand to have the trial court consider whether to impose the 10-year enhancement for use of a firearm (§ 12022.53, subd. (b)), not to strike the enhancement altogether, which the court already rejected. Remand is unnecessary when the "record shows that the trial court clearly indicated when it . . . sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Here, the trial court's comments indicate it would not reduce the enhanced term even if it had discretion to do so. The firearm "use" enhancement is distinct from the "discharge" enhancement in that the former recognizes an assailant may employ a gun to accomplish his or her criminal objective without firing it; thus, the former specifies that "[t]he firearm need not be operable or loaded for this enhancement to apply." (§ 12022.53, subd. (b).) In contrast, the court's comments emphasize that it believed Mendez had done more than merely brandish his weapon. In committing a vengeful "premeditated attempt[ed] murder," Mendez fired "numerous shots . . . not only at the victim, but towards others . . . in the occupied building, so it's not the type of case where the interests of justice would be served by striking that provision."

The court's comments at Mendez's original sentencing similarly reflect that it would not modify the enhancement if given the opportunity. The court observed that

Mendez's actions involved "great violence, [the] potential for great bodily harm, and a high degree of callousness." When defense counsel stated a "wish" or interest, despite then-mandatory rules, that "[t]he gun discharge [enhancement] be concurrent" to avoid "violat[ing] due process and the 8th Amendment," the court responded, "I don't think it's cruel and unusual at all." The court concluded, "Life plus 20 years doesn't sound cruel and unusual to me, so that's the sentence on Count 1."

These comments at Mendez's original sentencing and his resentencing, in conjunction with the facts presented here, convince us remand would constitute a useless gesture. In making her case at resentencing to strike the discharge enhancement, defense counsel presumably offered all she could in mitigation; but there was precious little to offer. Not youth, nor the circumstances of the crime (premeditated violent retaliation endangering the public), nor any other factors. His remand request therefore must fail.

Mendez is nonetheless correct, as the Attorney General concedes, on the point he raises in supplemental briefing. Namely, that the Legislature recently passed, and the Governor signed into law, Senate Bill No. 136 (2019-2020 Reg. Sess.) (SB 136), which amended section 667.5, subdivision (b), so that one-year prior prison term enhancements are limited to cases where the prior was for "a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (Stats. 2019, ch. 590; *People v. Winn* (2020) 44 Cal.App.5th 859, 872.) This change, effective January 1, 2020, is retroactive. (*Ibid.*)

The parties agree Mendez's prior prison term was not for a sexually violent offense, and therefore the prior prison enhancement allegation had no foundation once SB 136 became law. The trial court may have found the allegation to be true based on Mendez's admission to "all priors" in bifurcated proceedings following the jury's verdict. On the other hand, the court did not make a specific true finding as to the prison prior, nor as to an alleged strike prior, but the court expressly dismissed the strike prior "for

reasons stated on the record." The court did not refer further at sentencing or resentencing to the alleged prison prior.

Mendez views this record as suggesting that the trial court also struck the prison prior for purposes of sentencing at his original sentencing hearing, but argues remand is appropriate because the existence of the true finding may have factored into the trial court's sentencing choices. We disagree with this analysis. To the extent the court intended to strike the prior prison term enhancement allegation for purposes of imposing punishment, we presume it meant the allegation would not factor into its sentencing choices. In other words, we presume that if the court meant to strike the allegation for sentencing purposes, it meant to adhere to that ruling. (Evid. Code, § 664.)

The Attorney General, like Mendez, apparently views the record as suggesting the trial court made a true finding on the prison prior, and suggests that the finding be reversed because it has no application following the enactment of SB 136. We conclude that the simplest means to address the uncertain record is to remand the case to the trial court to correct and thereby clarify its minutes (§ 1260) by dismissing the prior prison term under section 667.5, subdivision (b), because it has no application now that SB 136 has become law.

DISPOSITION

We affirm the trial court's sentencing order in which it declined to strike the 20-year firearm enhancement the jury found true pursuant to section 12022.53, subdivision (c). We affirm the court's corresponding decision to reinstate the sentence it originally imposed. We remand the case and direct the court to correct and clarify its minutes to dismiss the prior prison term allegation (§ 667.5, subd. (b)). It does not appear the prior prison term allegation is reflected in the court's original or amended abstract of judgment, but if we have overlooked it, the court is authorized to amend the abstract of

judgment accordingly and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

GOETHALS, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.